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No. 94-153

In the
Supreme Court of the United States
October Term, 1994

COMMERCIAL UNION ASSURANCE CO., PLC,
COMMERCIAL UNION PENSIONS MANAGEMENT, LTD.,
GEMINI OVERSEAS CORPORATION, MERCIA ZURICH, A.G.,
OVERBROOK NOMINEES, LTD.
and STRAND NOMINEES, LTD.,

Petitioners,

-against-

MICHAEL R. MILKEN and LOWELL J. MILKEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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27 pp

Questions Presented

In this case, sophisticated offshore investors in a high-risk arbitrage partnership—who received back the full amount of their investment plus a profit directly from the partnership—sought damages under the securities laws and RICO. The district court held that these fully repaid investors had suffered no compensable injury, and granted summary judgment dismissing their action. The Second Circuit unanimously affirmed, and denied the investors' petition for rehearing with a suggestion for rehearing *en banc*. The certiorari petition raises the following issues, none of which is worthy of this Court's review:

1. Whether investors in a speculative partnership venture who shortly after filing suit received back all of their capital (plus a profit) from the partnership's assets, exclusive of litigation settlements, suffered an injury to their business or property entitling them to pursue a RICO treble-damages award.

2. Whether RICO entitles these investors to a mandatory attorneys'-fee award, where their lack of RICO injury deprives them of any legally cognizable RICO claim.

3. Whether the "proportionate fault" judgment-reduction rule endows these investors with damages under the federal securities laws, where their full recoupment (and profit) from the partnership deprived them of any compensable injury even before deducting their litigation recoveries from settling defendants.

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Respondents.

Counterstatement of the Case

Petitioners' Investments in the Boesky Partnership

On March 21, 1986, Ivan F. Boesky, a takeover-stock speculator, reorganized his risk-arbitrage business from corporate to limited partnership form. His new partnership was called Ivan F. Boesky & Co., L.P. (the "Boesky Partnership"). (A12)[1] The transaction included a private placement of $250 million of limited partnership interests.

Petitioners collectively purchased approximately $10.5 million (or 4.2%) of these Boesky limited partnership interests. Petitioner Commercial Union Assurance Co. plc, a large U.K insurance company, and three of its corporate affiliates (petitioners

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[1] "A __" refers to the appendix filed with the petitioner for certiorari. "Pet. __" refers to the petition for certiorari. "JA __" refers to the joint appendix filed in the court of appeals.

Commercial Union Pensions Management, Ltd., Overbrook Nominees, Ltd., and Strand Nominees, Ltd.) invested a total of $7,503,175. Petitioner Mercia Zurich A.G., a Swiss investment vehicle owned by a wealthy Japanese investor, invested $2,006,572. And petitioner Gemini Overseas Corporation, a Panamanian shell corporation owned by Swiss residents, invested $1,001,927. (A13)

Petitioners were well aware that their Boesky Partnership investments—in an arbitrage venture trading in the highest risk securities transactions (corporate takeovers)—could not be more speculative. (A12, A18) Indeed, the very first page of the Boesky Partnership prospectus proclaimed:

> **THE BUSINESS OF THE PARTNERSHIP ENTAILS A HIGH DEGREE OF RISK. SEE "RISK FACTORS" BELOW. INVESTMENTS IN THE PARTNERSHIP ARE THUS ONLY SUITABLE FOR CERTAIN "ACCREDITED INVESTORS." SEE "THE OFFERING—QUALIFIED INVESTORS" BELOW.**

The same 1986 prospectus also disclosed that the investment would be long-term and illiquid, and that investors could not withdraw their capital for five years.

Because of the extraordinary risks, prospective investors in the Boesky Partnership, including petitioners, were required before investing to sign and submit an "Investor Suitability Questionnaire" divulging their net worth and acknowledging (among other things) that they had read the prospectus and "understood the nature of this particular investment in the Partnership and the risks associated with such an investment[.]" (A12) In the same questionnaire, petitioners and the other investors also certified their understanding "that there [was] no guarantee of *any* financial return on this investment[.]" (emphasis added).

Although petitioners' investment was admittedly as speculative as could be, and Boesky, the partnership's principal, ultimately pled guilty to securities fraud, petitioners did not lose one cent. To the contrary, as detailed below, they received *all* of their money

back, *plus a profit*, not from any litigation settlement, but from the Boesky Partnership itself.

Boesky's Confession and the Boesky Limited Partners' Lawsuit

Ivan Boesky publicly confessed to a wide insider-trading scheme on November 14, 1986. Luckily for his limited partners, however, substantial assets remained in the Boesky Partnership. Harvard Law Professor David R. Herwitz was quickly appointed as the partnership's trustee, and began carrying out an orderly liquidation of its assets.

Concurrently with the liquidation process, purchasers of approximately $338 million in Boesky limited partnership interests, including petitioners, commenced this federal securities-fraud action in the Southern District of New York on March 20, 1987. The limited partners sued, among others, Boesky, the Boesky Partnership, Boesky's outside law and accounting firms, Dennis Levine, Martin Siegel, and a London brokerage house. Neither Drexel Burnham Lambert Inc. (Boesky's investment bank) nor respondents Michael and Lowell Milken were then named as defendants. The district court (Pollack, J.) permitted massive document discovery, but stayed all depositions pending the ongoing criminal proceedings involving Ivan Boesky and others.

In September 1988, the SEC brought a civil enforcement action against Drexel, Michael Milken (the former head of Drexel's high-yield bond department), Lowell Milken (Michael Milken's brother and a former Drexel high-yield bond department employee), and others. Parroting the allegations in the SEC's action and Drexel's January 1989 guilty plea, the Boesky limited partners obtained leave to add Drexel and the Milkens as defendants in this action on May 10, 1989. The claims against the Milkens (as subsequently amended) were predicated on an implied cause of action for "aiding and abetting" Boesky's primary violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.

§ 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5;[2] on Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2); on controlling-person liability under 15 U.S.C. §§ 78t and 77o; on RICO's provision for private damages actions, 18 U.S.C. § 1964(c); and on common-law principles. (A13-14; Pet. 5)

Petitioners' Full Recoupment and Profit from the Boesky Partnership

Eight months after the Milkens were added to the lawsuit, Professor Herwitz, the Boesky Partnership's liquidation trustee, began distributing partnership assets to the limited partners.

As set forth in an uncontradicted affidavit submitted by Professor Herwitz in this litigation, all of the limited partner-plaintiffs, including petitioners, received a distribution equal to the full amount of their invested capital on January 7, 1990. (Pet. 5)[3] Professor Herwitz's affidavit makes clear that this distribution came entirely "from the assets of the Partnership"—not from litigation settlements. Two subsequent distributions, in December 1991 and April 1992, also made exclusively from the Boesky Partnership's assets according to Professor Herwitz's affidavit, yielded petitioners a 10.2% profit on top of their 100% capital recoupment. (A14) And after Professor Herwitz submitted his affidavit, we understand that petitioners received an additional distribution (not included in the

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[2] Petitioners' Section 10(b) claims do not survive this Court's recent decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1455 (1994), which abolished "aiding and abetting" liability under that statute. In a conclusory footnote, petitioners assert that their complaint "pleads facts sufficient to allege a primary violation" under *Central Bank*. (Pet. 5 n.2) Petitioners do not explain how they can transform these "aiding and abetting" claims into direct claims because they cannot. *Central Bank* constitutes an additional independent ground to affirm dismissal of these claims.

[3] To be precise, the Commercial Union entities received back 99.7% of their Boesky Partnership investment on January 7, 1990. The other petitioners each recouped 100% of their investments on that date.

Second Circuit's analysis), lifting petitioner's profit to 13.8%.[4/] The courts below unanimously found that petitioners' undisputed recoupment and profit from the corpus of the Boesky Partnership deprived them of any compensable injury and therefore any cognizable claim for relief.

In addition, petitioners, together with other Boesky limited partners, received proceeds from two third-party litigation settlements (with Boesky's outside law and accounting firms) on October 7, 1991. Combining these litigation settlements with all Partnership distributions to date, petitioners got back all of their money plus a profit of 18.2%—in a high-risk venture where they had acknowledged the distinct possibility of receiving *nothing*.

As below, in an effort to prevent dismissal of their claims, petitioners mischaracterize the liquidation agreement pursuant to which the Boesky limited partners recouped their capital (plus a profit). This agreement reordered certain Boesky Partnership interests to facilitate the liquidation of the Partnership and the return of the limited partners' capital (including petitioners' investments) from the Partnership's assets. In addition, the agreement provided that Drexel and an affiliate would receive payments of $20.3 million for certain Boesky Partnership interests, and that Drexel would be dismissed from this action "without prejudice." (JA1155-1496; Pet. 5)

Petitioners attempt to turn this liquidation agreement into a settlement of their claims against defendants in this action. They assert that their recoupment of their "March 1986 capital investment [was] pursuant to an Agreement of Settlement with several defendants, including Drexel and the partnership." (Pet. 5) Petitioners add that "[t]he Milkens were not parties to the Settlement Agreement and did not contribute to the payments made under it." (*Id.*) These statements are plainly intended to suggest that the amounts petitioners received back in January 1990 were *paid* by "Drexel, the

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[4/] Specifically, on November 22, 1993 (including certain prior tax withholdings and interest payments), the Commercial Union entities received a further gross distribution of $290,277; Mercia Zurich received $77,629; and Gemini Overseas Corp. received $38,762.

Partnership and certain other defendants" in settlement of petitioners' purported securities and RICO claims in this action.

The courts below correctly rejected this distortion of the record. The so-called "settlement agreement" did not "settle" petitioners' purported claims against Drexel or any other defendant. Neither Drexel nor the Boesky Partnership received a release of petitioners' claims in this action; Drexel was dismissed "without prejudice"; the Boesky Partnership was not dismissed at all; and Drexel did not pay a cent to petitioners—to the contrary, Drexel and an affiliate *received* a multimillion-dollar payment from the Partnership. The Second Circuit summed it up perfectly:

> [W]e reject appellants' contention that the payments by Professor Herwitz were settlements and not a return of appellants' capital investment. This conclusion is warranted given that the monies paid to appellants derived directly from the proceeds of the sale of assets held by the partnership, as appellants' counsel conceded. The complex 'settlement' appellants constantly refer to was simply a reordering of partnership interests to facilitate the Boesky partnership liquidation.

(A16-17)

In reaching this conclusion, the Second Circuit did not engage in "appellate factfinding," as petitioners assert. (Pet. 7) The detailed Boesky Partnership "Settlement Agreement" and Professor Herwitz's affidavit setting forth the amounts and nature of petitioners' recoupments and settlements were both part of the undisputed summary judgment record. Based on its review of these unambiguous documents and other undisputed facts, the court of appeals simply agreed with the district court's legal conclusion that petitioners had no damages, and thus no claims, under the securities laws and RICO.

Petitioners' Opt-Out of the Milken Global Settlement

In April 1990, respondent Michael Milken, after long negotiations with the Government, pled to a six-count information unrelated to petitioners' securities purchases. The Government never filed any charges against respondent Lowell Milken, who has consistently denied all allegations of wrongdoing.

In March 1992, a $1.3 billion Global Settlement was reached that was intended to resolve over 180 pending civil lawsuits, including this action, and involving hundreds of defendants, including Michael and Lowell Milken. (JA951-93; *see also In re The Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 289 n.2 (2d Cir. 1992)) By that time, all of the Boesky limited partner-plaintiffs, including petitioners, had received back not only the full amount of their Partnership investments, but a profit of nearly 15% (including litigation settlements). Not surprisingly, in the light of this full recoupment and profit, nearly all of the limited partner-plaintiffs joined the Global Settlement and ceased this litigation.

Petitioners, however, who represented only 3.1% of the Boesky limited partnership interests, opted out of the Global Settlement. They assert here, as below, that they did so because the Global Settlement "would have required them to release their claims against the Milkens in return for an unspecified allocation from an inadequate settlement fund . . . ." (Pet. 6) Although petitioners had the right to opt out of the Global Settlement, their stated reason for doing so is a pretext. The settlement fund that these fully compensated investors call "inadequate" contains *$1.3 billion*. (JA956-59) Petitioners' real goal in pressing this litigation despite their full recoupment was to inflict massive litigation costs in an effort to extract an unwarranted payment from the Global Settlement's $50 million indemnity fund. (JA972-73)

Petitioners' Abusive Litigation Tactics

Petitioners pursued this strategy—which the district court aptly termed "oppressive and prolific litigative conduct"

(A31-32)—with a vengeance. The full record of their abusive tactics (which ultimately led the district court to invite the Milkens to file a sanctions motion against them, *see id.*) included the following:

- Shortly after Judge Pollack indicated that he would lift the stay on depositions, petitioners demanded 27 depositions around the country, repeatedly defying the court's request that they narrow their list to necessary witnesses.

- At the same time, petitioners stonewalled the defense's modest discovery program, refusing to confirm the precise amounts of their own Boesky Partnership investments and recoupments, and brazenly defaulting on a duly noticed deposition of petitioner Mercia Zurich.

- Petitioners also defied Judge Pollack's orders that they update and narrow their colossal complaint to comply with Rule 8(a), Fed. R. Civ. P., cavalierly serving three massive complaints totaling 479 pages (in addition to a 108-page RICO case statement) designed only to camouflage their lack of compensable injury. They then demanded that respondents go through the pointless (but costly) exercise of specifically responding to *each* of petitioners' *over 1,100* allegations.[5/]

- In the summary judgment proceedings, these fully compensated investors attempted to create nonexistent damages, and deceive the district court, through (among other means) double counting. Caught red-handed, petitioners admitted the error but blamed it on "inadvertence."

[5/] Contrary to petitioners' assertion (Pet. 7), respondent Michael Milken did answer the complaint. Consistent with Rule 8(b), Fed. R. Civ. P., his answer generally denied liability subject to certain specifically admitted matters (principally, his allocution). (JA905-40)

The District Court's Summary Judgment Decision

The district court granted summary judgment dismissing petitioners' claims against the Milkens on May 3, 1993. (A28–32) In his decision, Judge Pollack rejected petitioners' "benefit of the bargain" damages theory (abandoned in this Court) and exercised his discretion (based on, among other things, petitioners' abusive litigation tactics summarized above) to deny petitioners' claim for an equitable award of additional "prejudgment interest" on top of the 14.8% profit they by then received. (A30)

Next, the decision succinctly disposed of petitioners' claim for RICO treble damages, holding that it was "flawed by the absence of any foundation for a compensatory recovery." (A31) As an additional, independent ground for dismissal of the RICO claim, Judge Pollack ruled that it was "insufficient in law," in that it "entirely lacks the existence of an ongoing enterprise separate and apart from the purported pattern of activity asserted, as well as in respect to other failings." (*Id.*)

Finally, the decision correctly dismissed petitioners' Section 12(2) claims on the ground that the Milkens "are not statutory sellers" as required by that statute because, among other reasons, neither Michael nor Lowell Milken "actually solicited the purchases made by the plaintiffs." (*Id.*)

After granting summary judgment in all respects and dismissing petitioners' recently amended complaint with costs, the district court's decision invited the Milkens to file a sanctions motion. The court also certified, pursuant to Rule 54(b), Fed. R. Civ. P., that "there is no reason for delay and the ongoing processing of the Drexel bankruptcy aspects of the global settlement should not be delayed and further hampered by this litigation" and accordingly directed the entry of final judgment in favor of the Milkens. (A32)

The Court of Appeals' Affirmance

The Second Circuit unanimously affirmed the district court's dismissal of all of petitioners' claims in a thorough, published

opinion. The core of the court of appeals' decision is the same as the district court's: the absence of "actual damages or consideration paid in the securities laws actions, and injury to plaintiffs' business or property in the RICO cause of actions." (A11)

After setting forth the undisputed facts and procedural background, the Second Circuit's decision analyzed petitioners' RICO claim. The decision correctly rejected petitioners' argument that under RICO the entire amount of their investment should be trebled before offsetting their prior recoveries (regardless of whether through partnership recoupments or litigation settlements). Observing that petitioners "have now recouped not only their initial investment, but also have received [a] 10.2 percent return on their capital," and noting that petitioners were amply advised of the risks entailed in the investment, the decision correctly concludes that petitioners have no "provable damages." (A18) The Second Circuit noted that a treble-damages award might be appropriate if "a portion of [petitioners'] investment in the partnership was unrecoverable" (assuming the other RICO requirements were satisfied), but accurately stated that such was not the case here. (*Id.*)

In view of its affirmance on the absence of RICO damages, the Second Circuit did not reach the district court's alternative ground for dismissal based on petitioners' failure to plead a legally sufficient RICO enterprise under *United States* v. *Turkette*, 452 U.S. 576, 583 (1981). (A19) This issue, however, provides an additional basis for affirmance.

After disposing of petitioners' RICO claim, the court of appeals turned to petitioners' securities-law damages theories, which met the same fate. The Second Circuit correctly held that petitioners' complete recoupment meant they had no out-of-pocket damages, and held that the district court had not abused its discretion in denying petitioners' equitable claim for prejudgment interest on top of their prior 14.8% profit (now 18.2%). (A19-22) Notably, the court of appeals correctly found that there is no support in the record for petitioners' argument, repeated here (Pet. 7), that Judge Pollack denied their prejudgment interest claim because they had opted out of the Milken Global Settlement. (A22)

The decision below also thoroughly analyzed, and rejected, petitioners' more exotic, but equally futile, securities-law damages

theories—"benefit of the bargain" and "disgorgement." (A22-24) Petitioners do not seek certiorari with respect to these rulings.

Finally, the Second Circuit affirmed the dismissal of petitioners' Section 12(2) claims, although on a different ground than that relied upon by the district court. (A24-27) The court of appeals found that there were disputed factual issues as to whether the Milkens are statutory sellers under Section 12(2),[9] but affirmed dismissal of the claims anyway because petitioners "have not suffered compensable damages under § 12(2)." (A25) The decision concludes, "Allowing them to maintain a cause of action under such circumstances would constitute a waste of judicial resources and a thwarting of Congress' aim in enacting § 12(2)." (*Id.*)

REASONS FOR DENYING THE PETITION

Nothing in this case warrants plenary review by this Court. The key issue presented—whether investors have a compensable RICO injury when they receive back all of their capital (plus a profit) from a speculative venture shortly after filing suit—was correctly decided below and is based on an unusual factual setting that is not likely to recur. The Second Circuit's unanimous decision is fully consistent with the precedents of this Court and other

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[9] In so holding, the court misapplied this Court's decision in *Pinter* v. *Dahl*, 486 U.S. 622 (1988). It also improperly considered "the fact that appellants never had the opportunity to depose either Boesky or the Milkens." (A26-27) If petitioners seriously believed that additional discovery—beyond the vast document and deposition discovery they obtained—could have somehow raised a genuine issue of fact, Fed. R. Civ. P. 56(f) required them to file an affidavit in the district court specifically setting forth "the nature of the requested discovery, its relevance to genuine issues of material fact, [and] what efforts [petitioners had] made to obtain the discovery and why these efforts were unsuccessful." *Belfiore* v. *New York Times Co.*, 826 F.2d 177, 184 (2d Cir. 1987), *cert. denied*, 484 U.S. 1067 (1988); *Burlington Coat Factory Warehouse Corp.* v. *Esprit de Corp.*, 769 F.2d 919, 926 (2d Cir. 1985). Petitioners failed to do so. These issues provide independent bases for affirmance.

circuits, and raises no question of constitutional magnitude or national importance.

I.
THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S *SEDIMA* DECISION

In their primary ground for certiorari, petitioners argue that the decision below "resurrects," in the "new guise of 'unrecoverable' loss," the RICO injury requirement rejected by this Court in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985). (Pet. 9) This argument misreads both *Sedima* and the Second Circuit's decision below. In fact, *Sedima* has nothing to do with this case.

Sedima involved a claim for RICO treble damages based on $175,000 in alleged overbillings by a co-joint venturer. *See Sedima*, 473 U.S. at 484. The district court and the court of appeals had held that no RICO claim was stated because, among other reasons, the complaint did not allege a "racketeering injury," *i.e.*, an injury "'different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter.'" *See id.* at 485. This Court reversed in a 5-4 decision, holding that, among other things, "the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern." *Id.* at 497.

That holding is fully consistent with the Second Circuit's decision here. Indeed, the *Sedima* majority emphasized that a RICO plaintiff "can only recover to the extent that[] he has been *injured in his business or property* by the conduct constituting the violation." *Id.* at 496 (emphasis added). Here, because of their full recoupment and profit from the risky Boesky Partnership venture, petitioners suffered *no* injury in their business or property, whether caused by the Milkens' alleged predicate acts or otherwise. *Sedima* is simply irrelevant.

The petition puts forth a new theory in an attempt to create an injury flowing from the Milkens' alleged predicate acts. Petitioners now argue that a jury could find that the Boesky Partnership securities bought by petitioners were "worthless" at the time they

were purchased, and therefore that petitioners were damaged in the full amount of the purchase price. (Pet. 11) Not only was this theory never argued below, but it contradicts petitioners' own allegations below, lacks any evidentiary support, and defies common sense.

When petitioners bought their securities, the Boesky Partnership was freshly capitalized with approximately $1 billion. Petitioners do not allege that Boesky or the other defendants engaged in any scheme to deplete that capital, nor could they in light of the undisputed fact that they recouped their entire investment (plus a profit) from that capital. To the contrary, petitioners specifically alleged in their "benefit of the bargain" damages theory below that the Boesky Partnership's capital *increased 27%* in the three months following their investments. (JA2257) Moreover, in their papers opposing summary judgment petitioners submitted no evidence at all of the Partnership's value as of the date of petitioners' investments. In any event, such evidence would have made no difference: any theoretical loss petitioners might have suffered at the moment they purchased their Boesky Partnership interests proved nonexistent when they subsequently received back all of their invested capital, plus a profit, directly from the Partnership's assets. Therefore, neither *Sedima* nor petitioners' latest damages theory gives these fully compensated investors a compensable RICO injury.

Petitioners also attempt to manufacture a conflict with *Sedima* by distorting the Second Circuit's decision. Specifically, they argue that under the decision below, "a RICO injury arises only if a portion or all of the plaintiff's damages are 'unrecoverable' after exhausting all available sources of collection." (Pet. 10) This is incorrect. The relevant paragraph of the decision states:

> [Appellants] assert they are entitled to a trebling of the full amount of their invested capital ($10.5 million), none of which had been returned when they initiated suit. But, as related, they have now recouped not only their initial investment, but also have received [a] 10.2 percent return on their capital, exclusive of additional funds paid to them as the result of several third-party settlements.

> Appellants' recovery stands in contrast to the risks—of which they were advised in the prospectus and investor suitability questionnaire—entailed in the purchase of the partnership interests. *If a portion or all of their investment in the partnership was unrecoverable, a treble damage award might be appropriate, assuming the other RICO requirements were satisfied.* But damages as compensation under RICO § 1964(c) for injury to property must, under the familiar rule of law, place appellants in the same position they would have been in but for the illegal conduct. Here appellants have already been placed by defendants in that position. Hence, in the instant case, without provable damages, no viable RICO cause of action may be maintained.

(A18; emphasis added)

Read in context, the italicized language stands for the straightforward proposition that if, contrary to the undisputed facts of this case, petitioners had *not* "recovered" the full amount of their investments from the Partnership's assets (and could satisfy RICO's other requirements), they might have had a viable RICO treble-damages claim. Contrary to petitioners' misreading, however, nothing in the court of appeals' decision here imposes a general requirement that RICO plaintiffs exhaust all "available sources of collection" (Pet. 10) before they may assert a treble-damages claim.

Petitioners likewise misconstrue the decision below and other Second Circuit decisions when they argue that "[t]he RICO limitations clock will not start running under this decision until there is *no* possibility that a RICO plaintiff may recoup his losses from any source." (Pet. 11) This is a red herring. The decision below did not even reach the issue of when petitioners' purported RICO claim accrued, much less adopt the standard stated by petitioners. Rather, the courts below found that petitioners had no damages in the light of their 100% recoupment (plus a profit) from the assets of the Boesky Partnership. This Court should not grant certiorari in this

case to pass upon an irrelevant RICO claim accrual doctrine not properly before the courts below, and not in conflict with the decision of any other circuit.

Equally unavailing is petitioners' purported "conflict" based on the antitrust doctrine rejecting a "no injury" defense when the plaintiff recoups its losses by passing on illegal overcharges to consumers. (A12-13) Such a doctrine has no bearing on this case, by analogy or otherwise. Petitioners here did not recover their alleged losses by "passing them on" to someone else; they got their own invested capital back and thus did not sustain a compensable loss.

II.
THERE IS NO CONFLICT WITH THE JUDGMENT-REDUCTION RULE

The court of appeals correctly rejected petitioners' contention "that they are entitled to a trebling of their damage award *before* any offset through settlements, restitution, recoupment or otherwise." (A17) According to the judgment-reduction rule applied in various multiple-damages contexts, third-party settlements are deducted from a damages award after multiplying the award, *see, e.g.*, *United States* v. *Bornstein*, 423 U.S. 303 (1976), but a return of a plaintiff's own property prior to judgment is offset prior to multiplying.

Thus, in computing their damages here, petitioners' capital recoupments from the Boesky Partnership's corpus—as opposed to their third-party litigation settlements—were properly subtracted from the amount of petitioners' investments, before trebling. Since, exclusive of third-party settlements, petitioners received back *all* of their invested capital (plus a profit) from the Partnership, their "damages" were zero. (A16-18) And zero trebled, even under RICO, is still zero.

This analysis follows directly from RICO's express statutory language, which limits civil RICO's treble-damages remedy to persons who have been "injured in [their] business or property by reason of" a substantive RICO violation. 18 U.S.C. § 1964(c); *see also Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495 (1985).

Under this provision, absent an injury to business or property, a RICO plaintiff lacks standing to sue; there is nothing to treble. Accordingly, courts have consistently dismissed civil RICO claims brought by plaintiffs, like these fully recouped investors, who "[w]ere not damaged by the transaction." *Viacom Int'l Inc.* v. *Icahn*, 946 F.2d 998, 100 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1244 (1992); *Fleischhauer* v. *Feltner*, 879 F.2d 1290, 1300 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990); *Korman* v. *Trusthouse Forte PLC*, No. 89-8734, 1990 WL 83353, at *5-*6 (E.D. Pa. 1990); *Heinold* v. *Perlstein*, 651 F. Supp. 1410, 1411 (E.D. Pa. 1987).

This rule also makes good sense. Offsetting litigation settlements after trebling gives RICO and antitrust plaintiffs an incentive to enter into pretrial settlements; otherwise, the plaintiff would sacrifice three dollars of a potential jury verdict for each dollar of pretrial settlement. But this salutary incentive does not operate where, as here, the treble-damages plaintiff simply gets his own money back from an investment. Deducting such a recoupment after trebling, under petitioners' perverse theory, would create an unseemly rush to the courthouse, as the plaintiff tries to file and collect on his treble-damages claim before his own money is returned to him. Petitioners' theory would even give the RICO investor-plaintiff an incentive to delay or prevent the return of her own capital, in the hope that it could be trebled in a subsequent RICO judgment jackpot. Federal judges are too busy to entertain such litigation crapshoots by fully compensated speculating investors.

Notwithstanding this well-settled, statutorily mandated, and sensible rule, petitioners contend that the Second Circuit's holding "conflicts with the Act's language, its legislative history and the rule other courts endorse in multiple damages actions." (Pet. 14) According to petitioners, the court of appeals' fidelity to RICO's express damage requirement somehow amounts to "adopt[ion] [of] a judgment reduction rule that in effect makes single damages a measure of recovery under Section 1964(c)." (*Id.* at 14-15) But once again, petitioners' argument rests on a misconstruction of the Second Circuit's decision, which certainly did not impose a "single damages" RICO rule. Rather, as discussed above, it found on the

unusual facts of this case that Partnership distributions had already more than restored petitioners to "the same position they would have been in but for the [allegedly] illegal conduct." (A18) Accordingly, in the absence of RICO injury, it held that there were no damages to treble.

The same analysis distinguishes the antitrust and False Claims Act cases that petitioners erroneously assert are at odds with the Second Circuit's decision below. (Pet. 17–20) For example, in *Bornstein*, 423 U.S. at 307, the False Claims Act case quoted and discussed at length in the petition (at 18–20), the compensatory payments offset after doubling the damages award were litigation settlements obtained by the Government against another party to the same fraud. Neither *Bornstein* nor any of the lower-court decisions cited by petitioners involved, as here, an investor who received back 100% of its invested capital directly from the investment corpus.

The Second Circuit correctly distinguished the Seventh Circuit's decision in *Liquid Air Corp.* v. *Rogers*, 834 F.2d 1297 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989), cited by petitioners here. (A16) In *Liquid Air*, a set-off was applied prior to trebling where the defendants themselves returned the property at issue to the plaintiff—*after* losing a RICO trial in which they contended that the property had already been returned! *See id.* at 1310. In contrast, as noted in the decision below, petitioners "in the case at hand received their capital investment back in full less than ten months from the time they commenced suit." (A18)[7]

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[7] The other cases cited by petitioners are similarly off the mark. In *Lehighton Area School District* v. *Gilbert*, 787 F. Supp. 429 (M.D. Pa. 1992), the court merely held that the plaintiff had stated a RICO claim where the defendant's purported restitution "did not include" certain allegedly misappropriated tax funds. *Id.* at 432. In *In re Nat'l Mortgage*, the plaintiffs did not get their own funds back; set-off was applied to settlement payments made by a third-party trustee. *See* 636 F. Supp. at 1151–52. And in *Pennsylvania* v. *Cianfranni*, 600 F. Supp. 1364 (E.D. Pa. 1985), which involved a state legislator who had placed "ghost workers" on the payroll, the Commonwealth had garnished the defendant's retirement benefits. *See id.* at 1367–68.

Petitioners' claim that the Second Circuit's decision "creates, in effect, a sanctuary for RICO offenders" (Pet. 20–21) is absurd. Petitioners state that under the decision below a "RICO offender can avoid treble damages by simply tendering payment of the plaintiff's out-of-pocket loss at any time before judgment" or if "the court believed that the plaintiff can find another way to collect the underlying loss." (*Id.*) This is untrue. The decision below addressed the rare situation where RICO plaintiffs received back their own money, not from alleged RICO offenders, but from the assets of their own investment partnership. In such a case, the alleged RICO offender is given no "sanctuary" because the purported RICO victims—like petitioners here—suffered no damages and thus are not victims at all.

III.
PETITIONERS' ATTORNEYS'-FEES ARGUMENT IS UNPRESERVED AND INCORRECT

Petitioners make the extraordinary argument that even if they lack any RICO damages (as the lower courts unanimously held), they "must be afforded an opportunity to establish by trial, if necessary, the defendant's liability as a predicate for the plaintiff's entitlement to the statutory fee award." (Pet. 21) In other words, even though by hypothesis their clients have no right to recover anything from the Milkens, the Milkens and the courts should be subjected to a months-long liability trial to enable petitioners' counsel to generate, and then collect, attorneys' fees.

To begin, petitioners did not make this argument below, and the decisions below do not address it. It is therefore an inappropriate basis for certiorari review.

Moreover, the argument is frivolous. The RICO statute provides for treble damages and a mandatory attorney's fee award to "[a]ny person injured in his business or property by reason of a" substantive RICO violation. 18 U.S.C. § 1964(c). Petitioners (or their counsel), as we have demonstrated, do not qualify.

The antitrust decisions cited by petitioners (Pet. 21–22) address a wholly different issue. In those cases, pretrial litigation settlements exceeded the amount of the treble-damages award. *See*

Gulfstream III Assocs., Inc. v. *Gulfstream Aerospace Corp.*, 995 F.2d 414, 419 (3d Cir. 1993); *Sciambra* v. *Graham News*, 892 F.2d 411, 416–17 (5th Cir. 1990). The Third and Fifth Circuits held that the RICO plaintiffs in those cases were still entitled to collect their mandatory fee awards because they, unlike petitioners, had suffered a RICO injury. Where, as here, plaintiffs suffer no RICO injury at all, they are not entitled to attorneys' fees. *See Aetna Casualty & Surety Co.* v. *Liebowitz*, 730 F.2d 905, 907 (2d Cir. 1984).

IV.
THE "PROPORTIONATE FAULT" RULE IS INAPPOSITE AND WAS NOT RAISED BELOW

In the proceedings below, petitioners advanced a wide variety of damages theories under the federal securities laws. Damages under these theories ranged from $15 million to $40 million to $400 million. Each of these theories was unanimously rejected by the district court and court of appeals, and all have been abandoned in this Court. Instead, relying principally on an admiralty decision, *McDermott, Inc.* v. *AmClyde*, 114 S. Ct. 1461 (1994), petitioners adopt a new tack. Now they contend that the courts below should not have deducted their recoupments and profits "*pro tanto* from any eventual judgment they may have had against the Milkens under the securities acts." (Pet. 23) Rather, they argue, a "proportionate approach," deducting only amounts reflecting the settling defendants' proportionate responsibility, should have been applied. (*Id.*)

This argument fails for at least three reasons:

First, once again, petitioners never raised this issue below. Quite the contrary. Citing *Singer* v. *Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990), the case they now contend applies an incorrect "judgment reduction approach" (Pet. 26), petitioners told the court of appeals that "under a correct application of the out-of-pocket damage measure, Appellants are entitled to their capital, plus prejudgment interest, offset by their settlements." (Brief of Plaintiffs-Appellants dated July 9, 1993, at 32) Certiorari is inappropriate under these circumstances.

Second, the "proportionate fault" rule discussed in *McDermott* and the lower-court authorities cited by petitioners is inapplicable to this case. As petitioners acknowledge, those cases involve the methodology for calculating the liability of non-settling defendants in the light of *settlement payments made by settling defendants*. (Pet. 23, quoting *McDermott*, 114 S. Ct. at 1463) Here, however, as the courts below correctly concluded based on the undisputed facts, petitioners' 110.2% recoupment (now 113.8%) was exclusive of settlement payments by the Milkens' co-defendants. Nothing in the "proportionate fault" rule gives these fully recouped investors damages under the federal securities laws.

And *third*, the Court's holding and reasoning in *McDermott* do not apply in federal securities laws actions. *McDermott*, an admiralty law case, was predicated on federal common law. *See* 114 S. Ct. at 1464-65. Exercising its traditional authority to fashion an appropriate substantive rule in that area of law, the Court weighed various policy objectives and adopted "proportionate fault" over the "pro tanto" rule. Among other things, the Court rejected application of the so-called "one satisfaction rule," which limits the plaintiff's total damages to the amount necessary to compensate him for his loss. *See id.* at 1470. That rule, however, may not be disregarded in the federal securities law context, because Congress has seen fit to enshrine it in a statute:

> [N]o person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his *actual damages* on account of the act complained of.

Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) (emphasis added).

Thus, petitioners' "proportionate fault" theory is unpreserved, inapplicable, and inconsistent with the federal securities laws. It does not merit this Court's review.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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New York, New York

Respectfully submitted,

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